No. 07-1059

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EURODIF S.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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This is not a run-of-the-mill trade dispute. The Federal Circuit in this case concluded, contrary to the judgment of the Department of Commerce (DOC), that unfairly priced imports of low enriched uranium (LEU) are beyond the reach of the antidumping-duty statute, 19 U.S.C. 1673, whenever the LEU is produced pursuant to contracts for the processing of raw material. That conclusion is neither compelled by the text of the statute nor consistent with its purpose. And the impact of that decision is not limited to this product; it threatens broadly to undermine the effectiveness of the trade laws. More importantly, the decision's impact goes well beyond the economic interests implicated by most trade disputes. The decision puts at risk important national-security and foreign-policy interests, including the vital interests in nuclear nonproliferation. This Court's review is warranted.

A. The Decision Below Is Incorrect

Contrary to respondents' characterizations (Eurodif Opp. 9-16; Ad Hoc Utilities Group (AHUG) Opp. 15-21), the question in this case is not whether the Federal Circuit correctly recited the rule of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Nor is the question whether Section 1673 applies only to "sales" of "foreign merchandise." Nor, finally, is the question whether separative work unit (SWU) contracts are contracts for the sale of enrichment services.

The question in this case, rather, is whether SWU contracts, and other similar contracts between foreign producers and domestic consumers for the "service" of manufacturing goods, result in "foreign merchandise * * * being * * * sold in the United States" within the meaning of Section 1673. DOC reasonably answered that question in the affirmative. The Federal Circuit erred in overriding that expert judgment. Because the Federal Circuit has exclusive jurisdiction over appeals in antidumping-duty cases, see 19 U.S.C. 1516a(a)(2); 28 U.S.C. 1295(a)(5), 1581(c), its error is a matter of national importance and warrants this Court's review.

1. As DOC explained in its final determination, uranium enrichment is "a major manufacturing operation for the production of LEU" that "results in the substantial transformation of the input product into an entirely different manufactured product." Pet. App. 229a, 240a. When such operations result in the introduction of the manufactured good into the commerce of the United States, that good qualifies as merchandise subject to the antidumping-duty statute. *Id.* at 240a-241a.

Respondents assert (Eurodif Opp. 10-12, 14-16; AHUG Opp. 20) that goods entering the United States pursuant to contracts for manufacturing services are

categorically exempt from antidumping duties because the domestic customer has purchased the manufacturing of a product, not the product itself. But regardless of whether the contractual price is meant to cover the value of the raw materials, the value of the manufacturing process, or both, cf. Eurodif Opp. 10-11, the fact remains that such a contract results in the transfer of the newly manufactured good to the customer in exchange for consideration. It surely was reasonable for DOC to conclude that a customer that pays for the manufacture of a product generally expects to receive the product itself in return. See Pet. App. 238a-241a.[1]

2. DOC found further support for its conclusion in its examination of the terms of the specific contracts at issue in this case and other record evidence. Respondents do not dispute the substance of those findings. In particular, they do not dispute that title to the finished LEU passes to the domestic customer only upon delivery. Nor do they dispute that the LEU received by the

[1] For the reasons explained in the petition (at 23 n.3), there is no conflict between DOC's determination and *Florida Power & Light Co.* v. *United States*, 307 F.3d 1364 (Fed. Cir. 2002). Nor does DOC's determination conflict with *Barseback Kraft AB* v. *United States*, 36 Fed. Cl. 691 (1996), aff'd, 121 F.3d 1475 (Fed. Cir. 1997), or *Centerior Serv. Co.* v. *United States*, No. 95-103C, 1997 U.S. Claims LEXIS 323 (Fed. Cl. Dec. 29, 1997). Those cases, like *Florida Power & Light Co.*, required the court to classify the contract between parties to a SWU transaction to determine their contract rights and obligations. See *Barseback Kraft AB*, 36 Fed. Cl. at 705 (determining that SWU contracts are not subject to the Uniform Commercial Code's requirement that a seller of goods under a contract with an open price term fix the price in "good faith," U.C.C. §§ 2-102, 2-305(2)); *Centerior Serv. Co.*, 1997 U.S. Claims LEXIS 323, at *18-*19 (same). The question in this case does not concern the classification of SWU contracts, but rather whether the transactions at issue result in the "sale" of "merchandise." See Pet. App. 233a-235a; *id.* at 240a-241a.

customer is not traceable to the feed uranium that the customer has provided to the enricher. Cf. Pet. App. 131a-134a. Respondents instead simply recite the Federal Circuit's determination that "ownership of either the unenriched uranium or the LEU is not meant to be vested in the enricher during the relevant time periods," and dismiss as irrelevant the fact that the finished LEU product received by the customer is not simply the customer's own original natural uranium, returned in enriched form. *Id.* at 20a; see Eurodif Opp. 12; AHUG Opp. 19.

Respondents' recitation of the Federal Circuit's reasoning misses the mark. As explained in the petition (at 20-25), the Federal Circuit's determination not only contradicts the conclusions of an expert administrative agency based on record evidence, but also answers a question the antidumping-duty statute does not ask. The statute applies when there is a "sale" of "foreign merchandise." The statute does not require that the title to finished merchandise, as such, vest in the manufacturer before the merchandise is transferred to a purchaser in order for the transaction to constitute a "sale." And, indeed, this case is apt demonstration of why the statute does not ask that question. Moreover, even if it were *possible* to read the statute to contain such a requirement, that is not the *only* way to read the statute. The Federal Circuit erred in substituting its own interpretation for the reasonable interpretation of the expert agency.

3. Finally, respondents suggest (Eurodif Opp. 14-15; AHUG Opp. 8-9, 20) that DOC's determination in this case is inconsistent with its tolling regulation, 19 C.F.R. 351.401(h) (2007). As discussed below, see note 2, *infra*, DOC has withdrawn that regulation. In any event, the

regulation (even when it was in effect) had no bearing on the question presented here, and played no part in the Federal Circuit's resolution of that question. See Pet. App. 17a-24a, 27a. As the CIT explicitly acknowledged, the tolling regulation provided guidance for calculating the dumping margin for goods *within* the scope of the antidumping-duty law; it "[did] not provide a basis to exclude merchandise from the scope of an [antidumping] investigation." *Id.* at 191a (citation omitted); see *id.* at 235a-236a.

Respondents also rely on administrative decisions that applied the tolling regulation in concluding that "contracting for manufacturing services does not constitute a relevant sale of the resulting merchandise." AHUG Opp. 9; see *id.* at 20; Eurodif Opp. 14-15, 17. As DOC explained, however, those prior decisions involved situations in which "both the toller and the tollee would make sales that could be construed as sales of subject merchandise"; DOC applied the tolling regulation to select the tollee as the respondent "producer" for purposes of constructing the relevant export price. Pet. App. 122a-124a; see Pet. 9. DOC did not apply the regulation to determine that the tolling transactions were entirely beyond the reach of the antidumping law. *Id.* at 112a, 235a. To the extent that the language of those decisions might have suggested that the transaction between toller and tollee could *never* result in a relevant sale for purposes of calculating the dumping margin, DOC determined that such a result would frustrate the purpose of the regulation and of the antidumping-duty statute in a situation where, as here, the tollee does not

sell the toll-produced merchandise. *Id.* at 124a, 157a-158a.[2]

B. The Decision Below Threatens Broadly To Undermine The Effective Enforcement Of The Antidumping Law

Respondents contend (Eurodif Opp. 16-18, AHUG Opp. 21-23) that review is not warranted because the decision below is limited to "the unique context of SWU contracts." Eurodif Opp. 16. Nothing in the Federal Circuit's decision, however, appears to turn on the unique circumstances under which LEU is made and purchased. The decision, rather, rests on its characterization of SWU contracts as contracts for the provision of services, which in turn appears to rest on an irrelevant determination that title never vested in the enricher. See Pet. App. 17a-24a, 33a-34a. There is no reason to think that contracts for such manufacturing processes are unique to the uranium industry, or would remain so in light of the loophole created by the decision below.

Nor does the fact that domestic utilities "consume[]" imported LEU, rather than selling it, Eurodif Opp. 16, distinguish the uranium industry from other industries. Using an item in a nuclear reactor is not the only way to "consume" it. A domestic entity might similarly "consume" processed steel, milled lumber, or semiconductors

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[2] The CIT in this case rejected DOC's conclusion that the tolling regulation does not apply in determining whether domestic utilities qualify as producers for purposes of export-price calculations. Pet. App. 50a-56a. The Federal Circuit did not address that ruling, see *id.* at 27a, and it is not at issue here. DOC has recently withdrawn the tolling regulation in response to the CIT's misreading of the regulation. See *Withdrawal of Regulations Governing the Treatment of Subcontractors ("Tolling" Operations)*, 73 Fed. Reg. 16,517 (2008) (interim final rule).

by using them in its own operations, or, for that matter, by using them to produce other items. Although respondents suggest that "the first downstream domestic sale of * * * an article in which [imported] materials were incorporated[] would trigger applicable dumping duties," Eurodif Opp. 16-17, sales of *domestic* merchandise do not constitute sales of foreign merchandise merely because imported materials were used in the manufacturing process, any more than the sale of electricity generated domestically by "consuming" LEU is imported merchandise. See 19 U.S.C. 1673, 1677a(a) and (b).[3]

C. The Decision Below Threatens U.S. Foreign-Policy And National-Security Interests

If this case concerned solely the effective administration of the trade laws, respondents' suggestion that this Court follow its "typical practice of waiting to see if 'potential' problems in fact materialize," Eurodif Opp. 16,

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[3] Section 1677a(e) of Title 19 provides no support for respondents' suggestion that "sales of imported products can be captured when the merchandise is incorporated into other products before it is sold in the United States." AHUG Opp. 22 & n.17; see Eurodif Opp. 17. Section 1677a(e) governs the calculation of constructed export price "[w]here the subject merchandise is imported by a person affiliated with the exporter or producer" and the sale price thus does not reliably reflect the price that would obtain in an arm's length transaction. 19 U.S.C. 1677a(e). Section 1677a(e) does not provide general authority for imposing antidumping duties on imported merchandise incorporated into domestic goods sold in the United States.

Nor would DOC's now-withdrawn tolling regulation, see note 2, *supra*, have provided a basis for capturing such sales. Cf. Eurodif Opp. 17 & n.7; AHUG Opp. 22. The tolling regulation would have had no application in the absence of a "relevant sale" of "foreign merchandise." 19 C.F.R. 351.401(h) (2007); 19 U.S.C. 1673. The regulation thus afforded DOC no authority to treat a sale of a domestic good as subject to the antidumping-duty statute.

might have some force. But this is not a typical trade case. Although the loophole created by the decision below could be expanded to other products, the product at issue here is far from routine. As explained in the petition (at 25-31), the decision below threatens important national interests in the particularly sensitive context of trade in enriched uranium. And although respondents downplay the significance of those national-security and foreign-policy concerns, the threat to U.S. interests is real, and it warrants immediate intervention.

1. Contrary to respondents' suggestions (Eurodif Opp. 18-21; AHUG Opp. 28-29), the possibility that the legislative branch might fix problems caused by the Federal Circuit's misinterpretation of the antidumping-duty statute provides no reason for this Court to deny review. In cases involving statutory interpretation, Congress could *always* solve the problem by legislation. The speculative possibility that Congress might ultimately enact one of the bills that are still pending in committee, see Pet. 26 n.4, should not deter the Court from considering the important questions presented by this case.

Respondent Eurodif also suggests (at 20-21) that the President could ensure full implementation of the Highly Enriched Uranium (HEU) Agreement by exercising his power under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, or under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. 1862, to limit imports of Russian commercially produced LEU. The theoretical existence of other means to bolster the HEU Agreement does not, however, diminish the importance of the means the government has chosen: a suspension agreement premised on the proper application of the antidumping law to im-

ported LEU. See Pet. 27. Moreover, any attempt to fashion an alternative mechanism for ensuring implementation of the HEU Agreement would inevitably cause disruption and delay, and implicate other aspects of this critically important bilateral relationship, even assuming that the requisite standards could be met. Invoking IEEPA in the manner that respondents envision certainly would be an unwelcome development in our relationship with Russia.[4] And to impose a limitation pursuant to Section 232 would require a determination that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. 1862(b)(3)(A) and (c)(1)(A). In the meantime, unfairly traded commercially produced Russian LEU could well overwhelm the U.S. market.

2. Respondents also contend (Eurodif Opp. 21-22; AHUG Opp. 26-29) that the United States has no compelling national-security interest in the continued viability of USEC, Inc., and its subsidiary, United States Enrichment Corp. (collectively USEC), the sole supplier of uranium enrichment for certain military purposes, because the United States already has sufficient supplies of enriched uranium and could easily enrich uranium itself if necessary. Respondents' contentions lack merit.

First, the United States does not, as respondents contend, have "a major surplus of weapons-grade uranium." AHUG Opp. 27 (citing *Secretary of Energy's Pol-*

[4] The President has invoked IEEPA in an executive order designed to protect payments due to Russia under the HEU Agreement. Exec. Order No. 13,159, 3 C.F.R. 277 (2001); cf. Eurodif Opp. 20-21. It would be a different matter to invoke IEEPA in the manner respondents suggest.

icy Statement on Management of the Department of Energy's Excess Uranium Inventory (Mar. 11, 2008) <http://www.ne.doe.gov/pdfFiles/Excess%20Uranium%20Inventory.pdf> (DOE Statement)); see Eurodif Opp. 22. As the Secretary's statement indicates, the Department of Energy (DOE) does have stocks of excess uranium in various forms, but the bulk of that inventory consists of natural uranium and depleted uranium, not weapons-grade uranium or LEU. DOE Statement 3-4. Enriched uranium comprises only a small fraction of that inventory. The United States currently uses its finite supplies of HEU outside the nuclear weapons program primarily to fuel the U.S. Navy's nuclear-powered vessels. HEU not suitable for that purpose is submitted for other uses, including downblending to LEU for commercial purposes and for use in research reactors. As the petition explains (at 30), the Navy will require a sustainable domestic provider of HEU when the current supply of that material is depleted. The United States also requires enriched uranium for other military purposes, including to fuel the nuclear reactors that produce tritium, a radioactive isotope necessary to maintain the U.S. nuclear arsenal, and which must be replenished because it decays. USEC operates the only uranium enrichment facility that is not subject to peaceful-use restrictions, and that is therefore capable of enriching uranium for those purposes.

Second, although DOE conducted uranium enrichment before USEC was privatized in 1998, cf. USEC Privatization Act, Pub. L. No. 104-134, Tit. III, Ch. 1, Subch. A, 110 Stat. 1321-335, that does not mean that USEC's survival is a trivial matter. To renationalize USEC's operations solely for military purposes would be extraordinarily expensive. And if the government were

to reenter the commercial enrichment market as a means of defraying that cost, the government would face the same problem that USEC does now: the threat of unchecked competition from unfairly priced imports.

3. Finally, respondent AHUG errs in contending (Opp. 28-29) that the effective enforcement of the antidumping-duty statute with respect to imported enriched uranium is unimportant as a matter of national energy policy. It is true that USEC soon will not be the only domestic enricher of uranium: Louisiana Energy Services (LES) is in the process of constructing a uranium enrichment facility in the United States, and other new enrichment facilities are in the planning stages.[5] Other entities undertaking domestic uranium enrichment, however, face the same threat that USEC currently faces as a result of the Federal Circuit's decision. The absence of effective protection from dumped enriched uranium threatens to increase the United States' dependence on foreign energy sources.

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[5] LES is owned by Urenco, a European uranium enrichment company. See United States Nuclear Regulatory Comm'n, *Louisiana Energy Services (LES) Gas Centrifuge Facility* (visited Mar. 31, 2008) <http://www.nrc.gov/materials/fuel-cycle-fac/lesfacility.html>. The LES facility will employ foreign technology that is subject to peaceful-use restrictions. There are no planned enrichment facilities that will be capable of producing enriched uranium for military uses, other than USEC's Piketon, Ohio, centrifuge facility. See Pet. 30.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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